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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 278

JOSEPH H. HIRSHHORN,

Petitioner,

vs.

MINE SAFETY APPLIANCES COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner respectfully shows:

I

Statement of the Matter Involved

Petitioner is the plaintiff in this cause, which was brought in the United States District Court for the Western District of Pennsylvania, in behalf of minority stockholders of subsidiary corporations, Carbon Monoxide Eliminator Corporation of Delaware, "Carbon," and Catalyst Research Corporation of Maryland, "Catalyst", to obtain equitable relief from the dominant corporation, Mine Safety Appliances Company of Pennsylvania, "Mine

Safety", and the individual defendants acting in concert with it, for their diversion and misappropriation of inventions, patents, and rights thereto which had been devised and obtained by scientist employees of the subsidiary corporations, to which said employees had expressly covenanted in writing to assign their inventions and patents and rights thereto while so employed. Other corporate misconduct was alleged and other incidental relief prayed for (R. 389, 390). Through majority stock ownership defendants were at all times in control of the subsidiaries and their employees, and occupied a complete fiduciary relationship to the minority stockholders of the subsidiaries (R. 394). At a cost of more than $200,000.00, petitioner owned 20,000 of 157,000 outstanding shares of stock of Carbon, which held a 60% stock interest in Catalyst. The other 40% was held by a Catalyst scientist since deceased (R. 390).

Petitioner being a resident of New York, jurisdiction of the cause and parties in the United States District Court was obtained through diversity of citizenship. Tit. 28, U. S. C. A. §§ 1331, 1332 (a) (1). In a challenge to the sufficiency of the complaint, the complaint was analyzed and the action upheld as a double derivative stockholders' suit by Schoonmaker, J., reported in 54 Fed. Supp. 588. On motion for discovery the issues were defined by Gourley, J., reported in 8 F. R. D. 11. After trial the action was dismissed on the merits by the District Court (Stewart, J.), on August 15, 1952 (R. 251a) and final judgment of dismissal was affirmed by the United States Court of Appeals for the Third Circuit, on April 2, 1953 (R. 397).

Since 1917 Mine Safety has been engaged in the manufacture of industrial safety equipment, and in World War I manufactured gas masks for military purposes (R. 235a, 315a, 316a). Carbon was incorporated in 1929 by Mine Safety interests for scientific research to develop a method to eliminate carbon monoxide from the exhaust gases

of internal combustion engines (R. 85a, 86a). Catalyst was organized in 1930 to develop chemical and mineral products and apparatus in connection therewith (R. 86a, 87a, 177a, 178a, 163a). Its business and activities embraced the whole field of chemical and mineral research and experimentation (R. 163a). Carbon with Catalyst had a separate laboratory, leased to Carbon by Mine Safety (R. 212a) and used by Dr. Owen G. Bennett. employed by both subsidiaries, and Dr. Carey B. Jackson, employed by Catalyst (R. 167a-176a). The dependence of the stockholders of the subsidiaries for investment return rested solely and completely upon the inventions of these two scientists, their only employees (R. 17a, 121a, 122a, 43a), conceded by the defendants to be not ordinary workers but men engaged in *unique and extraordinary employment* (R. 111a, 112a). From the beginning of their employment both of these scientists were put under express written covenants prepared and executed for the subsidiaries by the same officers who were officers of Mine Safety, to the effect that while employed in the business of the subsidiaries their new ideas, inventions and patents in connection with such business would be the property of their respective subsidiaries (R. 167a-176a). At first they worked in Carbon's laboratory in Baltimore, which later was moved to the laboratory in Pittsburgh that was leased to it by Mine Safety. In this separate laboratory the two scientists carried on their research, and at the direction of Carbon and Catalyst executives were consulted from time to time by Mine Safety employees (R. 46a, 47a, 43a).

To emphasize the nature of the investment of Carbon stockholders, personified by these two scientists, in January, 1936, John T. Ryan, its President, being also Vice-President of Mine Safety (since deceased), wrote to the stockholders a brief review of the activities of the subsidiaries, and stressed the fact that the only assets were patents of intangible value until products from them could be made at a profit, and that the stockholders had

a part in an important experiment which might or might not be profitable (R. 368a). In the last analysis, the investment was in the inventive ability of Dr. Bennett and Dr. Jackson; and nothing was said in the letter or revealed to the stockholders until the commencement of this action that Mine Safety was then appropriating the services of the scientists in derogation of the rights of the stockholders addressed (R. 148a, 149a, 150a).

The directors and officers of the subsidiaries were practically identical with those of Mine Safety, which together with the individual defendants, through majority stock interest in Carbon, controlled the subsidiaries (R. 81a, 339a-344a). Until 1943, Catalyst was financed by Carbon, its fiscal agent, through the sale of Carbon stock and loans from Mine Safety (R. 151a, 187a, 34a). Formal offerings for the sale of Carbon stock as late as August, 1941, were made by the common management (R. 187a). Petitioner was a consistent subscriber (T. N.* 199, 200, 202).

In 1935, the United States Government contracted with Mine Safety to invent an oxygen rebreathing apparatus and chemicals for use at sea level and in high altitudes, and Dr. Bennett was put to work to research the literature on the subject by the common management (R. 10a). In 1936, the management assigned Dr. Jackson to solve the chemical and mechanical problem involved (R. 142a). He worked out the problem successfully in the separate laboratory of Carbon and Catalyst, and obtained inventions and patents for both chemicals or chemical methods and apparatus (R. 132a, 322a). At the management's request he assigned these inventions and patents to Mine Safety (R. 145a, 244a). During this time his covenant to assign inventions to Catalyst was not cancelled or abrogated; he did not resign nor was he discharged from his employment by Catalyst (R. 137a, 138a). In 1942 in connection with one of these patents he filed an affidavit with the

* T. N. refers to trial notes, not printed.

United States Patent Office in which he swore that he was continuously employed by Catalyst from 1935 until March, 1940 (R. 201a-206a). The affidavit was prepared by attorneys for Mine Safety (R. 139a, 146a, 99a, 100a). His said inventions were all conceived before March, 1940 (R. 207a-211a). The affidavit was admitted in evidence to prove such employment (T. N. 711, 719).

The finding below is that, pursuant to an "arrangement" between the corporations, Dr. Jackson worked for both Catalyst and Mine Safety between 1935 and 1940, his salary being allocated between the corporations (R. 22a, 23a, 242a). But there never was any intercorporate arrangement. The management, personified by Deike, Ryan and Beggy, majority stockholders of Mine Safety, simply shifted him back and forth at their convenience, without the consent or knowledge of the minority stockholders of Carbon or Catalyst who, by virtue of his covenant to Catalyst, had a vital property interest in his inventions, which went into production of the re-breathers, sold to the United States Government to the extent of five and one-half million dollars to the end of 1941 (R. 19a, 31a, 34a, 35a, 148a, 149a, 22a, 24a, 25a) (Report, Congressional Committee, under H. Res. 162, May 5, 1942, Vol. 5, p. 1002) and in increasing volume to the end of World War II hostilities in 1945 (R. 103a). The proceeds of these sales were retained by Mine Safety without any payment or allowance to Catalyst for the discoveries and patents of its inventor.

In sum, the only allowance by Mine Safety to the subject corporations was $7,688.60, on a 10% sales basis upon the articles manufactured by Mine Safety through patents of Dr. Bennett, who worked under identical circumstances with Dr. Jackson, concededly owned by Carbon or Catalyst, and used without their agreement or consent (R. 45a, 229a, fol. 687). The amount of salary reimbursed by Mine Safety for Dr. Jackson while solving the re-breather problems was $1,575.00, as against the millions which it collected from the Government on the re-breathers (R. 194a, 207a-211a).

It has been found that Dr. Jackson's re-breather inventions were not made in connection with the business of Catalyst, but belonged only to the business of Mine Safety (R. 244a). Apart from the disqualification of the common directors, because of their complete fiduciary relationship and self-dealing and diversion of Dr. Jackson's covenant to Mine Safety (R. 145a) without the agreement or consent of all stockholders of the subsidiaries, the undisputed fact is that Catalyst, both by charter and activities from its organization in 1930, was engaged in chemical and mineral or mechanical research in an unlimited field. Its own incorporator and patent attorney, Albert E. Donaldson, called as witness by defendants, said, "It could go anywhere" (R. 86a, 87a, 177a, 163a). Obviously, when the officers of Catalyst, who were also officers of Mine Safety, engaged the services of Dr. Jackson on the re-breathers, they engaged the services of Catalyst on a matter within the scope of the latter's business, which was fundamentally research in its broadest sense.

The District Court adopted verbatim defendants' requested findings and none of plaintiff's (R. 234a-244a), an unorthodox procedure. *U. S.* v. *Forness,* 125 Fed. (2d) 924, 942.

The case has been decided as involving an issue of fact when there was no real factual issue, and in direct conflict with the great rule of law of the gravest general importance laid down by this Court and in the states involved, that fiduciaries cannot profit from their trust without the knowledge and consent of their beneficiaries. Here we have not the question of a mere ministeral act but of dealing with the essential assets of a subsidiary in the domain of intercorporate relations, rights and obligations.

II

Jurisdictional Statement

The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 (1) of Title 28 of the United States Code. The date of the judgment sought to

be reviewed by certiorari is April 2, 1953 (R. 397). The time to file the present petition was extended to August 29, 1953, by order of Mr. Justice Burton, dated June 12, 1953 (R. 398). The date of this application for certiorari is August 15, 1953.

III

The Questions Presented

The questions herein presented are:

(1) Did the Court of Appeals for the Third Circuit decide important questions of local law in a way probably in conflict with applicable local decisions, and in conflict with applicable decisions of this Court? (United States Supreme Court Rule 38, Subd. 5(b).

(2) Without the consent of minority stockholders, may the majority, exercising control and in complete fiduciary relation to the minority, appropriate the inventions of a research employee who has covenanted to assign his inventions to the corporation, the business of which is essentially research and experimentation?

(3) Do the inventions of a scientist, employed by and covenanted to assign his inventions to a subject research corporation, belong to said corporation, although on problems or projects obtained by the dominant corporation, which appropriates the inventions without the consent of all the stockholders of the subject corporation?

(4) May the directors of a subject corporation, who are also the directors of the dominant corporation, without the consent of the stockholders of the subject corporation, transfer the services of its research employee, hired at will and covenanted to assign to it his inventions in general chemical and physical research, to the dominant corpora-

tion, and procure from him assignment of his inventions in chemical and physical research, without the consent of all the stockholders of the subject corporation?

(5) Is such transfer and acquisition a proper, discretionary act of corporate administration, or does it impair and appropriate substantial vested, beneficial rights of the minority stockholders of the subject corporation?

(6) Should the covenant of a scientist employee to assign his inventions to a subject corporation, prepared by the officers and agents of the dominant corporation, be construed strictly against the dominant corporation, which diverts the services of the employee to itself and appropriate his inventions?

IV

Reasons Relied Upon for Allowance of the Writ

(1) The decision of the Court of Appeals, as well as that of the District Court, is in conflict with the applicable decisions of the state courts on local law, and the decisions of this Court. The states involved are Pennsylvania, Delaware and Maryland, the domiciles of the respective corporations. The fundamental principle which the decisions of those states enunciate is that a dominant interest charged with the management of a corporation, may not without minority consent, appropriate to itself the essential assets of the corporation. This principle is also emphasized in the decisions of this Court. Before such appropriation can legitimately take place in any manner or form, there must be complete disclosure, good faith, inherent fairness in the transaction, and all the elements of independent dealing between the respective interests. In the instant case the courts below refused to apply this principle, and the Court of Appeals held that its application would amount to an absurdity (R. 396).

(2) The covenant to assign future inventions from Dr. Jackson to Catalyst constituted a property right of the corporation in such inventions. Without them the corporation was an empty shell. The dominant corporate interest, in the position of trustee, could not deprive its beneficiaries, *viz.*, the minority stockholders, of their stake in the inventions without their consent and without adequate consideration. The dominant trustee interest was furthermore disqualified from diverting the covenant to its own advantage and claiming Dr. Jackson as its own employee and inventor while his employment and covenant with Catalyst remained in effect.

(3) The principle, laid down by this Court, that an employee's covenant to assign future inventions to his employer must be construed most strongly against the employer, has here been distorted by the courts below to enable the Mine Safety interest to invoke the principle as if it were the employee instead of the employer's trustee, when there was no controversy between employer and employee, with the result that Mine Safety has been unjustly enriched from millions of dollars of sales to the United States Government, without any compensation to Catalyst.

(4) The decisions of the courts below rest on the fiction of a dual employment of Dr. Jackson by Catalyst and Mine Safety, in conflict with the applicable state decisions that as a condition to such duality there must be an arms length agreement between general and temporary employer. Here there was no semblance of such agreement. The "arrangement" relied on below was in the minds of the common officers acting for the benefit of Mine Safety. There was no independent intercorporate action.

(5) On its face an alleged saving of $1,575.00 to Catalyst for salary reimbursed by Mine Safety during the time Dr. Jackson accomplished the re-breather inventions, which yielded Mine Safety huge profits from sales of patented

products to the United States Government present in equity an indisputable case of unjust enrichment, condemned in the decisions of the states involved and of this Court. Allowing for a fair royalty payment by Mine Safety on the inventions, which it did not pay, its net profit from manufacture and sale alone was enormous.

(6) The gravity and general importance of the decision sought to be reviewed transcend the immediate interests here. The decision bears on the ownership of monopolies, *viz.*, patents granted by the United States Government, on the mounting importance of scientific research in industrial corporations, particularly in the delicate relationship between dominant and subject corporations, and on the sanctity of the commitments and covenants of scientists to corporate employers, whose investors hazard their substance, as Ryan here stated, upon the productive results of experimentation and invention.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Third Circuit had in the case numbered and entitled in the Docket No. 10894, Joseph H. Hirshhorn, Appellant, v. Mine Safety Appliances Co., a corporation, et al., Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of the United States Court of Appeals for the Third Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, August 15, 1953.

JOHN B. DOYLE,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

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BRIEF IN SUPPORT OF PETITION

I

Opinions and Judgments in the Courts Below

The decision, consisting of Findings and Conclusions of the District Court, was filed August 15, 1952 (R. 234a-250a), 106 Fed. Supp. 594.

The judgment of the District Court was entered August 15, 1952 (R. 251a).

The opinion of the Court of Appeals for the Third Circuit was filed April 2, 1953 (R. 389), 203 Fed. 2nd 279.

The judgment of the Court of Appeals was entered April 2, 1953 (R. 397).

II

Statutory Provision Sustaining Jurisdiction

The action is a double derivative stockholders' suit filed in the United States District Court for the Western District of Pennsylvania, by reason of the diversity of citizenship between the plaintiff, a resident of New York, and the defendants, residents of Pennsylvania, Delaware and Maryland, respectively, and all transacting business in Pennsylvania (R. 234a, 235a). Title 28, U. S. C. A. §§1331, 1332 (a) (1). Appeal from the final order and judgment of dismissal of the action by the United States District Court was had to the United States Court of Appeals, by virtue of Title 28, U. S. C. A. §1291.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A. (1254) (1).

III

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-6, inc.), which is hereby adopted and made part of this brief.

IV

Specification of Errors

The District Court and Court of Appeals were in error in that

(1) They decided this cause in conflict with the applicable decisions of the state courts involved, and the decisions of this Court.

(2) They failed to apply the rule of trusteeship imposed upon Mine Safety and its interlocking directors that they

could not deprive Catalyst of its property rights, actual or potential, without full disclosure to and consent by the beneficiaries of their trusts, to wit, the minority stockholders of Carbon and Catalyst.

(3) They imposed the burden of proof upon the plaintiff to establish that the re-breather inventions belonged to Catalyst, whereas the burden was upon Mine Safety to prove the contrary, which was impossible, because whatever the interlocking management directed Dr. Jackson to do was necessarily part of his covenanted employment.

(4) They held that Mine Safety could lawfully engage or adopt the services of Dr. Jackson without the termination of his employment by Catalyst and without the agreement or consent of the minority stockholders of Carbon and Catalyst, who, under his covenant, were beneficiarily entitled to share in the avails of his inventions, and the only independent stock interest that could bargain for such services with Mine Safety.

(5) They held that work on the re-breather chemicals and apparatus was not connected with the business of Catalyst, whereas it was unquestionably so connected, because Catalyst's field of research on chemicals and minerals was unlimited, both by charter powers and actual experience, and the use of Dr. Jackson's services on the problem was a conclusive admission by Mine Safety and the interlocking directors that the matter was connected with Catalyst business and accomplishment.

(6) They decided this cause upon the fiction of a dual employment of Dr. Jackson by Catalyst and Mine Safety, whereas there was no agreement or consent to that effect by his general employer, Catalyst; Mine Safety and the interlocking directors and officers were disqualified from making or claiming such agreement or consent.

V.
ARGUMENT

FIRST POINT

The United States Court of Appeals for the Third Circuit has decided this cause in probable conflict with the decisions of this Court.

As dominant corporation and interlocking directors owing it primary allegiance, Mine Safety and the individual defendants were charged with the exercise of powers in trust. Where self interest was involved they could not by any agreement or "arrangement" *inter se* appropriate to Mine Safety the property, actual or potential, business opportunities or scientific personnel of the subsidiaries, whose services were conceded to be unique and extraordinary, without meeting the acid test of inherent fairness. Since they held the minority stockholders at their mercy, inherent fairness in equitable principle meant complete disclosure and independent dealing; an arm's length bargain. There was no semblance of this in the case at bar. In the circumstances such a bargain was impossible without the agreement or consent of the minority stockholders, who had no representative on the subsidiary boards except Dr. J. C. W. Frazer, the pioneer inventor, who on June 25, 1942 roundly denounced the interlocking management for working for the sole profit of Mine Safety, and allowing the subsidiaries no opportunity to profit from work "which clearly comes in their field" (R. 190a). Dr. Frazer died before the trial (R. 153a).

By an unbroken line of decisions this Court has insisted upon application of the above fundamental principle, without observance of which the fiduciary interest must account

to its beneficiaries. *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307; *Corsicanna Nat. Bank* v. *Johnson*, 251 U. S. 68, 90; *Pepper* v. *Litton*, 308 U. S. 295, 306; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 522. "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." (*Pepper* v. *Litton, supra*, 306.) The basis of those decisions is "the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents." *Munson, et al.* v. *S. G. S. C. R.R. Co., et al.*, 103 N. Y. 58, 73.

A precise, parallel application of this rule is found in *Liken, et al.* v. *Shaffer, et al.*, 144 Fed. (2d) 877, where officers and directors put a corporation into receivership and at public sale bought the company assets, worth over $100,000.00, for less than $4,000.00, without stockholder knowledge or consent. The court adjudged the purchase unfair on its face as matter of fiduciary relationship and duty alone, involving a disparate bargain which yielded a staggering and immediate profit to the management and loss to stockholders. It said (p. 880): "A fiduciary cannot shift momentarily into a wholly arm's length position where his duty to the beneficiary still remains."

In the present case the courts below have held that it was inherently fair for Mine Safety by reimbursing Catalyst for $1,575.00 of Dr. Jackson's salary (R. 194a, 207a-211a) to "borrow" his services and take his inventions under which it manufactured and sold to the Government millions of dollars worth of air re-breathing apparatus and chemicals, the profit on which was estimated by Government auditors to be more than one-third of the sales price. (Report of hearings of Congressional Committee under H. Res. 162, May 5, 1942, Vol. 5, p. 1002.)

SECOND POINT

The United States Court of Appeals for the Third Circuit has decided this cause in probable conflict with the local law of the states involved.

The District Court ruled that since the intercompany transactions complained of took place in Pennsylvania, the law of Pennsylvania governs (R. 245a). It also ruled that as to the management of the subsidiaries, the case is governed by the laws of Delaware and Maryland, wherein Carbon and Catalyst were respectively incorporated (R. 245a). The Court of Appeals held that *Pepper* v. *Litton*, 308 U. S. 295, is equally applicable in Pennsylvania (R. 394). It also held that the District Court was right in deciding that Mine Safety had sustained the burden of showing that its acquisition of the re-breather patents constituted arm's length transactions (R. 394). It further held that to the extent that Mine Safety's alleged misappropriation of the re-breather resulted from the mismanagement of Carbon's Catalyst's own directors, the trial court properly ruled that the burden was upon the plaintiff, who had not sustained that burden; but on this phase of the case it held that the applicable law was that of Delaware and Maryland, respectively, which is not at variance with that of Pennsylvania (R. 394, 395).

(a) **Pennsylvania.** Where the appropriation of the corporate property or rights by the controlling or majority interest is for its enormous aggrandisement, with little or no benefit to the subject or minority interest, there must be consent by the minority.

Bailey v. *Jacobs*, 325 Pa. 187, 200: "Only if all the stockholders consented could any binding ratification be given to the use by defendant of the company's funds". In that case, besides money, the defendant had taken patents essential to the company's purposes.

Bird Coal & Iron Co. v. *Humes,* 157 Pa. 278, 289: "But a director is a trustee * * * and he cannot directly or indirectly derive any personal profit or advantage by reason of his position distinct from his co-shareholders". Here the Court of Appeals has said that Mine Safety was the same as a director. In foot-note 7: "The allegation is practically speaking, the same as the charge that Mine Safety violated its fiduciary duty to Carbon and Catalyst, since the directors of all these corporations were virtually identical" (R. 395).

Hill v. *Frazier,* 22 Pa. 320, 324: "It is a universal rule that one to whom the management of any business is confided, cannot create other relations which will put him in an attitude of hostility to his principal or *cestu que trust.*"

Pennsylvania Knitting Mills v. *Bayard,* 287 Pa. 216, 221: "That two corporations have a majority or even a whole membership of their boards of directors in common, does not necessarily render transactions between them void, but transactions resulting from the agency of officers and directors acting at the same time for both, must be deemed presumptively fraudulent, unless expressly authorized or ratified by the stockholders, *Corsicanna National Bank* v. *Johnson,* 251 U. S. 68, 90".

Quaker State Oil Refining Co. v. *Talbot,* 315 Pa. 517, 523, confirms the equitable ownership of Catalyst in the inventions of Dr. Jackson by virtue of his written covenant, because it follows the principle enunciated in *Solomons* v. *United States,* 137 U. S. 324, 346: "That which he has been employed and paid to accomplish becomes when accomplished the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer." Dr. Jackson's covenant was never abrogated (R. 138a, 175a). It could

not be nullified by the fiction, device or subterfuge of the common management in saying that he had been employed part time by Mine Safety to invent the re-breather. On elemental grounds this property right as well as the employment must first have been surrendered by Catalyst. *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 226. Mine Safety interests could not spirit the employee away from his covenanted employment, albeit at will, and salve their consciences by reimbursing to Catalyst a minor, if not negligible, portion of his salary. *Truax* v. *Reich,* 239 U. S. 33, 38. Nor by construing the covenant most strongly against Catalyst with respect to scope and duration of employment, because they were Catalyst fiduciaries and bound to act most favorably to it all the time. *Bird Coal & Iron Co.* v. *Humes,* 157 Pa. 278, 289. Dr. Jackson's services were conceded to be unique and extraordinary (R. 111a, 112a). They could not be shifted to Mine Safety, even for part time, without the consent of the Carbon-Catalyst minority, the only possible element as an independent bargaining factor. *Weegham* v. *Killifer,* 215 Fed. 168; S. C. 289 (Pa.).

(b) **Delaware.** In accord with the law of Pennsylvania as above reviewed, are *Allied Chemical & Dye Corp.* v. *Steel & Tube Co.,* 14 Del. Ch. 1, 18; *McFarlane* v. *Cement Corp.,* 16 Del. Ch. 172 (that the judgment of self-dealing stockholders or their agents on what is fair in the transaction is entitled to little or no weight); *Keenan* v. *Eschelman,* 23 Del. Ch. 234; *Guth* v. *Loft, Inc.,* 23 Del. Ch. 255.

(c) **Maryland.** Also in accord, *Cumberland Coal Co.* v. *Parish,* 42 Md. 578.

Research fails to disclose any case dealing with ownership of inventions developed in the dominant-subject corporate relation, but individuals in an *alter ego* position to corporate employers have been held to a strict trust liability and accounting. *National Wire Bound Box Co.* v.

Healy, 189 Fed. 49, 53; *Dowse* v. *Federal Rubber Co.*, 254 Fed. 308.

This Court will not review concurrent findings of the courts below, but findings of good faith and fairness mean nothing where fiduciaries are dealing with themselves without a word to their beneficiaries, and where what is found conflicts with the fundamentals of equity which govern the conceded trust position of defendants. The accumulation of patent litigation in this country proves that elusive questions involving large interests and general importance to industry are presented for adjudication. The monopoly of a patent is a perennial subject of manipulation. When innocent investors are induced to venture their capital in research corporations, controlled as here by major manufacturing enterprise, it is of grave and far reaching importance to the public that their investments should not be successfully coveted by the hand that rules.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision in this case.

Dated, August 15, 1953.

JOHN B. DOYLE,
Counsel for Petitioner.

WALTER M. NEWMAN,
H. PRESTON COURSEN,
EDWIN A. MCGUIRE,
Of Counsel.

FILED
SEP 16 1953
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 278

JOSEPH H. HIRSHHORN, Petitioner,

v.

MINE SAFETY APPLIANCES COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The opinion of the District Court (R. 234a-250a) is reported at 106 F. Supp. 594. The opinion of the Court of Appeals for the Third Circuit (389-396) is reported at 203 F.2d 279.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. In the absence of ratification by minority stockholders, are dealings between parent and subsidiary corporations invalid *per se*?

2. Where a corporation and its subsidiary employed the same chemist to work intermittently for each on their respective, unrelated research projects and the District Court made findings that the arrangement was in good faith and was fair to the subsidiary, is the subsidiary entitled to an interest in certain patents issued to the chemist on inventions discovered by him while working for the parent, merely because a fiduciary relation exists between parent and subsidiary?

STATEMENT

Since its inception in 1917, Mine Safety Appliances Company ("Mine Safety") has had as one of its principal activities the development and manufacture of various types of gas masks and rebreathing apparatuses to be worn or carried as safety devices to protect the wearer against oxygen shortage or noxious gases or both (262a-263a, 279a-280a, 296a, 310a-311a, 315a-317a, 375a). In 1934, Mine Safety began experimentation upon the development of a rebreather containing chemicals which, when acted upon by the moisture of the wearer's breath, would automatically liberate oxygen and thus eliminate the necessity of the oxygen tank carried by the wearer of an ordinary rebreathing apparatus (310a-314a). In April, 1936, the United States Navy commissioned Mine Safety to carry on these experiments for the Bureau of Ships for use aboard ship in fighting fires, and for the

Bureau of Aeronautics for use in aircraft at high altitudes where the oxygen supply is low (126a, 308a, 313a-314a). By 1940, Mine Safety's staff of scientists and engineers succeeded in developing such a rebreather. A number of patents were obtained, all of which were assigned to Mine Safety (218a-221a, 302a).

Some of the work on the rebreather was performed by a chemist named Jackson in whose name several of the patents were issued. This litigation arises out of petitioner's claim, on behalf of Catalyst Research Corporation ("Catalyst"), to an interest in these patents.

The following facts were found by the District Court, were based on substantial, virtually uncontradicted, evidence and were affirmed by the Court of Appeals:

In 1935, Jackson had been hired as an employee at will by Catalyst to do research on what had become its principal project (305a, 349a, 366a; Dist. Ct. Finding No. 20, 239a)—a hydrogenation catalyst for use in the manufacture of a vegetable shortening similar to Crisco and Spry (113a-114a, 118a, 350a). Between 1931 and 1934, Jackson had worked on the same project as a part-time employee of Catalyst while a student at Johns Hopkins University (44a-45a, 100a, 113a-114a, 118a, 350a; Dist. Ct. Finding No. 45, 242a). As he had done when first employed, Jackson, at the time of his re-employment by Catalyst, executed a covenant to assign to it any inventions made by him in connection with its business while employed by it (175a-176a; Dist. Ct. Finding No. 55, 244a).

In September, 1936, Mine Safety engaged Jackson to work on its rebreather project (276a-277a, 287a-288a;

Dist. Ct. Finding No. 51, 243a). While working on the rebreather project, Jackson was Mine Safety's employee (Dist. Ct. Finding No. 53, 244a). In connection with this work, Jackson reported to and worked under the Director of Research of Mine Safety (91a, 138a, 289a). His fellow workers on the project were Mine Safety employees (110a-111a, 281a, 299a, 302a, 309a). Mine Safety paid his salary (194a-195a, 259a-260a, 328a-329a, 331a-332a). All of the materials, tools and supplies used were furnished and paid for by Mine Safety (125a-126a).

The work done by Jackson on the rebreather project had no connection whatever with any work ever done by him for Catalyst (300a-302a; Dist. Ct. Finding No. 59, 244a). Catalyst had never engaged in the rebreather business nor in the business of developing chemicals for use in rebreather apparatuses, nor in any related enterprise 253a, 275a-276a, 300a-301a, 314a). None of the research on the rebreather project involved catalytic research (133a, 295a, 306a).

The employment of Jackson by Mine Safety was fair and to the best interests of Catalyst (Dist. Ct. Finding Nos. 47, 48, 243a). Prior to the time he was employed by Mine Safety to work on its rebreather project, Jackson had completed his research work on the hydrogenation catalyst (119a, 350a), the project which Catalyst had engaged him to work upon. Further work upon the project was virtually at a standstill, awaiting the decision of the officers of Catalyst on the feasibility of beginning commercial manufacture (356a-358a, 381a-383a). Catalyst had no other work for Jackson to do (120a-121a). It was without funds and had to borrow

money to pay his salary (366a-369a, 381a-385a). Mine Safety's employment of Jackson did not interfere with his work for Catalyst. Until its final abandonment Jackson continued to work intermittently on the hydrogenation catalyst (115a-116a, 136a-137a, 305a, 326a). Each corporation severally paid his salary for the work done for it (58a-59a, 115a-116a, 194a-198a, 258a-261a, 331a-332a; Dist. Ct. Finding No. 46, 242a).

Because his rebreather inventions were discovered by Jackson in connection with the business of Mine Safety and as its employee and not in connection with the business of Catalyst, the District Court concluded that Jackson's covenant gave Catalyst no rights in these inventions (Dist. Ct. Finding Nos. 51 to 59, 243a-244a; Dist. Ct. Conclusion of Law Nos. 14 to 24, 248a-249a).

The District Court found further that the employment of Jackson by Mine Safety and the practice under which his salary was allocated between the corporations was fair and to the best interest of Catalyst (Dist. Ct. Finding Nos. 47, 48, 243a). The District Court also found that there had been no mismanagement of Catalyst's affairs (Dist. Ct. Finding No. 31, 240a). It therefore concluded that Catalyst had no right, title or interest in the patents obtained by Jackson in connection with his work on the rebreathers and that it was not entitled to any of the profits earned by Mine Safety through the sale of the rebreathers (Dist. Ct. Conclusion of Law Nos. 25, 26, 249a-250a).

The Court of Appeals affirmed these findings and the judgment of the District Court (397).

ARGUMENT

FIRST POINT: There is no conflict of decision.

In disposing of petitioner's claim, the Court below did not decide important questions of local law in a way in conflict with applicable local decisions or in conflict with the applicable decisions of this court (Dist. Ct. Conclusion of Law Nos. 5, 6, 7, 10, 11, 245a-247a; Opinion of the Court below, 394-396).

Petitioner argues that a corporation can have no valid dealing with another corporation which it controls without the knowledge, consent and unanimous approval of the stockholders of the controlled corporation. This he refers to as "the great rule of law" with which the decision of the Court below is in conflict (Petitioner's Statement of the Matter Involved, p. 6). No such principle has been laid down by this court or by the courts of the states involved. Petitioner cites no decision of this court or of the courts of the states involved to support such a proposition.[1] The Court below rejected petitioner's claim that such a prophylactic rule governed

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1. Petitioner cites only *Munson, et al. v. S.G.S.C. R.R. Co., et al.*, 103 N. Y. 58, an 1886 decision of the Court of Appeals of New York. New York is not one of the states involved. Moreover, the *Munson* case no longer authoritatively states the law of New York. "To the extent that *Munson v. Syracuse, G & C R. Co.*, (1886) 103 N. Y. 58, 8 N. E. 855, may be said to impose a more rigid standard, it yields to the more moderate view expressed by both prevailing and dissenting opinions in *Everett v. Phillips*, (1942) 288 N. Y. 227, 43 N.E.2d 18." *Piccard v. Sperry Corporation*, (D.C., S.D.N.Y.) (1943), 48 F. Supp. 465, 467.

such transactions. It applied the tests of good faith and inherent fairness. In doing so, it followed the decisions of this court and the local law of the involved states. *Mercantile Library Hall Co. v. Pittsburgh Library Association,* 173 Pa. 30, 33 A. 744 (1896); *South Side Trust Co. v. Washington Tin Plate Co.,* 252 Pa. 237, 97 A. 450; *Bonini v. Family Theatre Corporation,* 327 Pa. 273, 194 A. 498 (1937); *Corsicana National Bank v. Johnson,* 251 U. S. 68, 90, 40 S. Ct. 82, 64 L. ed. 141, 155 (1919); *Geddes v. Anaconda Copper Mining Co.,* 254 U. S. 590, 41 S. Ct. 209, 65 L. ed. 425 (1921); *Cannon v. Brush Electric Company of Baltimore,* 96 Md. 446, 54 A. 121; *Williams v. Salisbury Ice Co.,* 176 Md. 13, 3 A.2d 507.

What petitioner really asserts is not a conflict between decisions; rather, he seeks to have reviewed the evidence and findings of fact based thereon. Certiorari will not be granted for this purpose, especially where the findings of fact have been concurred in by two lower courts. *General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175, 178, 58 S. Ct. 849, 82 L.ed. 1273; *Comstock v. Group of Institutional Investors,* 335 U. S. 211, 214, 69 S. Ct. 1454, 92 L.ed. 1911.

SECOND POINT: The decision of the Court below is correct.

Even if the court were constrained to grant certiorari for the correction of error, the issuance of the writ would not be justified in this case because there is no error.

The findings of the Court below and of the District Court that Jackson conceived his rebreather inventions in connection with the business of Mine Safety and as its employee, and not in connection with the business of Catalyst while employed by it are overwhelmingly supported by the evidence.

The propriety and validity of the arrangement under which Jackson was employed by Mine Safety to work on the rebreather project must, of course, be decided in the light of the facts as they existed in 1935 and 1936. *Solimine v. Hollander,* 128 N.J. Eq. 228, 16 A.2d 203, 219; *Blaustein v. Pan American Petroleum & Transport Co.,* 293 N. Y. 281, 56 N.E.2d 705, 715; *Turner v. American Metal Co.,* 268 App. Div. 239, 50 N.Y.S.2d 800, 813.

By lending Jackson to Mine Safety, Catalyst relieved itself of the burden of going further in debt to pay his salary, when it had no work for him to do, and at the same time kept him available for any work on its hydrogenation project which should arise. It was an exceedingly prudent business arrangement.

Petitioner argues that the terms of this arrangement—that is, that each corporation would pay Jackson's wages for the work done for each—are unfair, because no provision was made to share with Catalyst the fruits of Jackson's labor for Mine Safety.

He deals with the situation as though Catalyst had acquired, by reason of its employment of Jackson, a vested interest in all his future discoveries. Such a view disregards the facts. The arrangement between Catalyst and Jackson was commonplace. Jackson was an employee at will (248a). By his covenant with Catalyst, Jackson agreed only to assign to it inventions discovered in connection with its business—rights Catalyst would have had without a covenant. *Solomons v. United States,* 137 U. S. 342, 346, 11 S. Ct. 88, 34 L.ed. 667 (1890).

It was entirely reasonable and fair for Mine Safety to arrange that the discoveries which resulted from the work which Jackson had been employed to do for Mine Safety and paid by it to accomplish, should become, when accomplished, the property of Mine Safety.

Contrary to petitioner's innuendo, the minority stockholders were not induced to invest in Catalyst (through Carbon) by the representation that they were acquiring an interest in all the future discoveries of Jackson or of any other Catalyst employee. On the contrary, the reports to the stockholders specifically advised them that their investment was an investment in the uncertain future of the carbon monoxide eliminator and the hydrogenation catalyst (155a, 366a-368a). That Jackson was also working for Mine Safety was disclosed to and discussed with them (60a).

By comparing Mine Safety's rebreather profits and Catalyst's savings of Jackson's salary, petitioner seeks to give the impression to this court that the relative advantages to Mine Safety and Catalyst under the arrangement were so disparate that the arrangement must have been unfair. In addition to the facts that peti-

tioner's calculation of the savings to Catalyst is erron
ous and his figures concerning Mine Safety's profits fi
no support in the record, petitioner's argument is sp
cious. The real advantage that Catalyst sought and d
rived from the arrangement was that Jackson remain
available to it to do work on the hydrogenation proje
should it become commercially feasible for Catalyst
enter this field.

That Mine Safety's research project succeeded a
Catalyst's failed is not a proper basis for evaluating t
fairness of the arrangement entered into at a time wh
the outcome of the respective projects could not have be
anticipated. Not even petitioner could urge that amo
the duties of a fiduciary is prescience.

Merely because Mine Safety was the majority
controlling stockholder of Catalyst, it was under no du
to turn over to Catalyst the rebreather project so th
Catalyst could have employed Jackson upon it. Mi
Safety having employed Jackson, its general fiducia
relationship to Catalyst did not require that it donate
Catalyst all or some part of the fruits of his labors f
Mine Safety. A fiduciary is under no philanthropic ob
gation to a *cestui que* trust. Mine Safety was under
duty to make "handouts" of its money, its business oppo
tunities, or of its rights to inventions discovered by
employees upon its business to anyone, not even to
subsidiary corporation. *Lindberg Machine Works*
Lindberg, 305 Ill. App. 543, 27 N.E.2d 565; *Pressed St*
Car Co. v. Hansen, 3 Cir., 137 Fed. 403, 2 L.R.A. (N. S
1172; *Velsicol Corporation v. Hyman,* 338 Ill. App.
87 N.E.2d 35; *Detroit Testing Laboratory v. Robison,* 2
Mich. 442, 191 N. W. 218.

There was nothing wrong — nothing unfair to Catalyst—in the employment of Jackson by Mine Safety. It will be necessary to invent a completely new rule of law to make it wrong. Such rule would convert a parent corporation's fiduciary duty to deal fairly into a benevolent obligation to practice philanthropy toward a subsidiary. Such rule would entirely disregard the rights of the stockholders of the parent. There is no such rule.

Certiorari should be denied.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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Statement

The gist of Mine Safety's justification of its alleged employment of Jackson is that in September, 1936, he was out of work for Catalyst. At pages 3 and 4 of respondents' brief it is asserted that Mine Safety engaged Jackson to work on the rebreather project, which, however, at that time was but an unsolved problem, because Catalyst had no other work for him to do. This is flatly contradicted by Mine Safety's own records of the subsidiary payrolls, which show that between January 1, 1936 and

December 31, 1937, 65% of Jackson's salary, advanced by Mine Safety, was charged to Catalyst (R. 194a). Mine Safety, therefore, did not employ a man out of work; without asking leave, it "borrowed", *i. e.*, helped itself to the services of Jackson from Catalyst, whose covenanted right to his inventions remained intact. There is no evidence of Catalyst "lending" Jackson to Mine Safety, as stated on page 8 of respondents' brief.

Jackson's general and exclusive employment by Catalyst was never changed into a "dual employment."; that is a figment contrived by defendants perforce their manipulations of the payrolls of Jackson and Bennett, the research scientists of Carbon-Catalyst, whose minority stockholders and boards of directors knew nothing about the "adjustment" (R. 21a, 22a, 25a, 43a, 44a, 58a-60a). Dual employment connotes agreement between general and special or temporary employer, a bargain, much less an arm's length bargain, of which here there was no semblance. And when Jackson was requisitioned on the rebreather, his work in the Carbon-Catalyst laboratory (R. 132a) which resulted in his rebreather inventions, was certainly connected with the purposes and actual business of Catalyst, *viz.*, to develop chemical and mineral products and apparatus in connection therewith (R. 86a, 87a). It was chemical and metal experimentation.

At page 9 of their brief respondents also assert that Jackson's work for Mine Safety was disclosed to and discussed with Catalyst stockholders. The reference (R. 60a) is to Deike's testimony; but that is of no value, because it refers to the transfer of Carbon and Catalyst to Pittsburgh, and was corrected by Deike himself when he emphatically stated in connection with Jackson's reemployment by Catalyst in April 1935, that as part of their employment by Carbon and Catalyst both Jackson and Bennett were expected to cooperate with Mine Safety (R. 46a, 47a). On May 31, 1935, Deike as President signed

up Jackson to transfer his inventions to Catalyst, with no mention of Mine Safety (R. 175a, 176a).

But the overshadowing and far-reaching error and wrong and resulting conflict from the decisions below, which should be reviewed in the general interest of justice and corporate administration, is that while the courts below have paid lip service to the fiduciary principle, they have utterly failed to apply it to master-servant relations where dominant and subject corporate interests are involved. They and respondents maintain that dealings between parent and subsidiary corporations do not require for validity the approval or ratification of minority stockholders; but that is not the question. Here there was no dealing between parent and subsidiary. It was the unilateral act of mine safety, the parent. The subsidiary, in so far as the minority were concerned, had nothing to do with it. The real question is, where the majority have the minority at their mercy, may they appropriate to themselves essential or main property or property rights of the subsidiary without the consent or acquiescence of the minority? (R. 145a). The answer as applied to this kind of case is that they cannot; otherwise, what has been written and adjudicated of trust relations is a mockery (*Allied Chemical & Dye Corp.* v. *Steel & Tube Co.*, 14 Del. Ch. 1, 12 Atl. 486).

ARGUMENT

I.

Application of the Fiduciary Principle.

This refers directly to petitioner's second specification of error (Brief, pp. 12-13).

On the present record it must be acknowledged that the management (Mine Safety) (R. 347a) was and is trustee of the corporate assets of Catalyst, notably, Jackson's productivity and, under the assignment, his products, for the beneficiaries, *viz.*, the minority Catalyst stockholders.

The domination of Mine Safety was so absolute that no other rule could apply. This Court has said in *Pepper* v. *Litton*, 308 U. S. 295, 306, that the powers of a dominant stockholder or group of stockholders are powers in trust; also that their dealings, contracts or engagements with the subject corporation or interest must carry the earmarks of an arm's length bargain. There was no bargain or dealing, no contract or engagement between Mine Safety and Catalyst; Jackson's services and inventions were simply appropriated, and part of his salary charged by defendants to Mine Safety. As shown in the foregoing statement, this was done without any notice to or knowledge, much less consent, of the Catalyst minority. Dr. Frazer's protest of June 25, 1942, emphasized that Mine Safety had deprived the subsidiaries of profits from work which clearly came within their field (R. 190a, fol. 570). In such a situation the liability of strict trusteeship should have been imposed on Mine Safety. *Pepper* v. *Litton* (*supra*) means nothing less. At page 311 it defines the elements and restrictions: the fiduciary cannot serve itself first and its *cestui* second; it cannot manipulate the affairs of the subject corporation to their detriment and in disregard of the standards of common decency and honesty; it cannot use the corporate entity to violate the ancient precept against serving two masters; it cannot use its inside information and strategic position for its own preferment; it cannot violate rules of fair play by doing indirectly through the subject corporation what it could not do directly; it cannot use its power for its own advantage, no matter how meticulous it is to satisfy technical requirements.

In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 590:

> "If he should be a sole director or one of a smaller number, vested with certain powers, this obligation would be still stronger and his acts subject to more severe scrutiny and their validity determined by more rigid principles of morality and freedom from motives of selfishness."

The true principle, therefore, that should have been applied by the courts below to the acts of Mine Safety with respect to Jackson and his inventions, was liability commensurate with the absolute power which it wielded, as absolute as that of any trustee under a testament or other formal instrument. The greater the power the more exacting the fiduciary obligation and liability. This is at the basis of the local law of Pennsylvania, Delaware and Maryland in the decisions cited in petitioner's brief (pp. 16-18). In such a case the "great rule of law" which invalidates self-dealing, self-serving acts of a trustee with the subject matter of his trust, still applies. Despite the assertion of respondents to the contrary, *Munson* v. *S. G. & C. R. R. Co.*, 103 N. Y. 53, survives in its full sweep where control is absolute. Learned Hand, C. J., in *Dabney* v. *Chase National Bank of N. Y.*, 196 Fed. (2d) 668, 670. It depends on whether the subject interest has had an opportunity, through director representation or otherwise, to assert itself and challenge an appropriation by the controlling interest; if it has not, the dominant party must be judged on the basis of strict trusteeship, the obligations and disabilities of which are set out in Sections 170, 205 and 206 of the Restatement of the Law of Trusts. There must be a disclosure to the beneficiary of all material facts, section 170(2); the trustee may not profit at the beneficiary's expense without the latter's consent, section 170(2)(a); personal interest may not conflict with duty as trustee, section 170(2)(b); a trustee may not dispose of the trust res to itself while acting as corporate fiduciary, section 170 (2)(d); or to another corporation where the directors are the same or nearly the same, section 170(2)(d); or use the trust property for its own purposes, section 170(2)(e); or compete with the interests of the beneficiary, section 170(2)(o); and acquisition without the consent of the beneficiary may be set aside or call for accounting of profits, section 170(2)(u). Violation of these obligations and restrictions or any of them incurs the liabilities imposed by sections 205 and 206.

If Jackson had been assigned to solve the rebreather problem in the laboratory of Carbon-Catalyst, where it was solved, and his salary while so engaged was charged 100% to Catalyst, certainly the appropriation of his rebreather inventions by Mine Safety without the consent of the Catalyst minority as beneficiaries of the trust, would have been a bald violation of the above principles. The device of charging part of his salary to Mine Safety while Jackson was so engaged was no less so, and constituted no consideration for appropriating his productivity, to which Catalyst was entitled. It was a violation without the consent of the Catalyst minority, on suitable terms of return to Catalyst for the productivity. A bargain was indispensable. There was no bargain.

The Court of Appeals has ruled that the part payment of Jackson's salary and appropriation of his rebreather inventions, was an unimportant factor in these intercorporate activities, and that to contend that minority consent was required for their validation is an absurdity (R. 396). On the contrary, it was an all-important factor, because it tampered with the contract of employment of Jackson by Catalyst, and diverted the property in his future inventions, which had been assigned to that subsidiary, in the inventions which fell squarely within the charter purposes and varied activities of Catalyst (R. 86a, 87a, 177a, 178a, 163a).

In this setting, findings of good faith and fair dealing are immaterial; defendants kept faith and dealt only with themselves, not with Catalyst.

The fiduciary theory enunciated in *Pepper* v. *Litton* (*supra*), and universally held, and defined in the Restatement of the Law of Trusts, leaves no doubt that in the present case the crucial and controlling fact is that defendants' appropriation of Catalyst's corporate property was inconsistent with their fiduciary obligations to the

Catalyst minority stockholders who, having given no consent thereto, are entitled to restitution and an accounting for the unlawful appropriation.

The case is novel in its facts and implications, no precedent has been found directly pertinent to them, and the decisions of the courts below are so erroneous that in the interests of justice they warrant review and reversal by this Court.

Dated, September 21, 1953.

Respectfully submitted,

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